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matter it may be imprudent to wait for the judiciary to strike them down. Because in this state the voting restrictions combine with inequitable assessment practices and other inefficiencies created as by-products of the property tax system,³⁷ the most inspired remedy would be major constitutional reform.

COMMUNITY ANTENNA TELEVISION— A COPYRIGHT INFRINGER

Plaintiff licensed its copyrighted motion pictures to a television broadcasting station. Defendant, a Community Antenna Television¹ (CATV) System, received the station's broadcast, amplified the signal,

Because the 40% validation requirement is based on the last preceding general election, i.e. the last general election in the district, absurd disparities result. See *Seattle School Dist. No. 1 v. Odell*, 54 Wn. 2d 728, 344 P.2d 715 (1959) and see 59-60 WASH. OPS. ATT'Y. GEN. NO. 133 (1960). In Seattle, for example, the 1965 excess levy required 106,000 votes for validation because the last general election happened to be the 1964 presidential election; the 1966 excess levy required only 40,500 votes for validation because only 101,000 votes were cast in the last (1965) general election. See WASHINGTON EDUCATION ASSOCIATION, *RESEARCH IN EDUCATION* Vol. 9, No. 3 (1966). Such indefensible disparity results from the totally arbitrary nature of this aspect of the system.

Additional inequities result from the county assessors' disregard of the constitutional mandate to assess at fifty per cent of true value of the property. See WASH. CONST. art. 7, §2, amend. 17 (1944). Not one assessor in the state satisfies the constitutional requirement, see WASHINGTON STATE TAX COMMISSION, *COUNTY RATIO EQUALIZATION STUDY: 1966 ASSESSMENT* (1966), and since *Clark v. Seiber*, 48 Wn. 2d 783, 296 P.2d 680 (1956), where the state supreme court invalidated an effort by the legislature to give the state board of equalization the power to bring valuations closer to the fifty per cent requirement, the matter has remained completely under the control of individual assessors, who demonstrate no willingness to change. Subsequent efforts by the state to bring assessment practices into conformity with the constitutional requirement have been merely persuasive and not very effectual, see Harsh, *The Washington Tax System—How It Grew*, 39 WASH. L. REV. 944 (1965), with the result, *inter alia*, that property of residents in one taxing district is assessed at a different rate than property of residents in other taxing districts. See Comment, 66 UTAH L. REV. 491 (1966), for a discussion of assessment practices strikingly similar to those in Washington and for a discussion of recommended changes. See also Tiedman, *Fractional Assessments—Do Our Courts Sanction Inequality?*, 16 HASTINGS L.J. 573 (1965), for a discussion of the inequities created by fractional assessment. A harmful side effect of the assessment practices in Washington has been the frequent need to resort to the excess levy as a source of revenue for the individual taxing districts. See WASHINGTON EDUCATION ASSOCIATION, *RESEARCH IN EDUCATION* Vol. 9, No. 3 (1966) for an indication of the scope of the reliance throughout the state on the excess levy as a source of revenue.

³⁷ See text accompanying note 36 *supra*.

¹Community Antenna Television (CATV) systems are a communications advancement which allows television reception in fringe areas where reception would be virtually impossible without a CATV system. CATV systems are a burgeoning industry. In January 1965 there were 1,600 systems in the United States and the number has been increasing at a rate of approximately forty systems per month. *Hearings Before the Subcommittee No. 3 of the Committee on the Judiciary*, 89th Cong., 1st Sess., ser. 8, pt. 1, at 35 (1966).

and retransmitted it via coaxial cable to paying subscribers operating their own television sets in private homes and places of business. Plaintiff brought suit under the Copyright Act,² alleging infringement on grounds that defendant had unlawfully performed plaintiff's copyrighted work. *Held*: Copyright protection of motion pictures extends to movies shown in private homes and places of business by means of CATV systems operated for profit.³ *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966).

The Copyright Act, section 1 gives a copyright holder the exclusive right to "play or perform [the copyrighted work] in public for profit . . . or reproduce it in any manner or by any method whatsoever."⁴ In *Buck v. Jewell-LaSalle Realty Co.*,⁵ receipt by a hotel and distribution to its guests by means of speakers in private rooms and hotel lounges of an unauthorized broadcast of a copyrighted song was deemed a "performance" within the meaning of section 1. This holding was subsequently extended in *Society of European Stage Authors & Composers, Inc. v. New York Statler Co.*,⁶ to include playing copyrighted music in private hotel rooms even when the original station broadcast was authorized. The principal case represents the first consideration of the Copyright Act and these decisions in the context of CATV systems.

In the principal case the court reasoned that by receiving and retransmitting signals via coaxial cables, defendant committed acts amounting to performance, because CATV amplifies, modulates, and superimposes the station's television signal on a new carrier wave generated by the CATV system. The court differentiated this "active" operation from reception and forwarding of station signals by a simple antenna system. Because CATV, in its process, actually created its own television signals, it was held to have "performed" the copyrighted work. In reaching this conclusion, the court relied heavily upon the *Buck* and *Statler* cases, treating them essentially as controlling precedent on the question of whether the CATV activity constituted "per-

² 17 U.S.C. § 1 (1964).

³ Bills were introduced into the 89th Congress which would expressly make CATV systems for profit subject to the Copyright Act § 1, 17 U.S.C. § 1 (1964), S. 1006, H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6836, 89th Cong., 1st Sess. (1966). These bills were within Subcommittee No. 3 of the House Committee on the Judiciary at adjournment of the 89th Congress.

⁴ 17 U.S.C. § 1 (1964).

⁵ 283 U.S. 191 (1931).

⁶ 19 F. Supp. 1 (S.D.N.Y. 1937).

formance" within section 1 of the Copyright Act.⁷ Simultaneously, however, the court recognized that CATV represented a truly new and unique communications technique, never before brought within the purview of the Copyright Act. It stated that the case demanded "statutory construction . . . that will accommodate the underlying legislative purpose and the realities of modern communications technology,"⁸ and further, that the Copyright Act should be interpreted to "be reasonable in that it would not lead to an absurd, unfair, or shocking result."⁹ Therefore, while viewing *Buck* and *Statler* as controlling, the court recognized that the issues warranted careful consideration, as indicated by its statement that "the evidence is technical and this case presents important questions of first impression"¹⁰

An undesirable result of the principal case is the construction which it placed upon the Copyright Act. The court established a precedent for mechanical interpretation of the act, seemingly made more *in vacuo* than in light of "realities of modern communications technology," the ostensible criterion of the court. Since the Copyright Act antedated CATV, it is impossible to determine whether the act's general language was intended to encompass CATV. While unambiguous statutory language should be given its literal meaning, the Copyright Act's general terms should have compelled application of the rule that ambiguous statutes should be construed to avoid "absurd, unjust, or inconvenient" results.¹¹

An opposite result in the principal case would have been preferable in several important respects. It is submitted that copyright holders' economic interests in restricted use of their work are amply protected by the bargaining process attendant film licensing to broadcasting stations, without bringing CATV operations within the ambit of the Copyright Act. Television transmission is supported almost entirely by commercial advertising during broadcasts, and prices commanded for advertising time increase with the number of viewers. Therefore, use of any device which enlarges potential viewing audiences will create additional station revenue from advertising. As copyright holders' royalties are largely a product of the revenue-producing capabilities

⁷ Epstein, *Copyright Protection and Community Antenna Television Systems*, 19 FED. COM. B.J. 97, 101 (1964-1965), made the same argument.

⁸ 255 F. Supp. at 180.

⁹ *Id.* at 203.

¹⁰ *Id.* at 180.

¹¹ CRAIG, *STATUTE LAW* 86-90 (6th ed. 1963).

of the copyrighted material, it follows that benefits from audiences increased by innovations such as CATV will tend to inure to the copyright holders as well as to CATV operators and original broadcasters.¹²

The principal case is an unnecessary and undesirable extension of *Buck* and *Statler* to a novel and distinct communications industry. *Buck* and *Statler* should not be considered as controlling precedent for CATV because there is no similarity between multiple radio speakers in a hotel, and the complexities of CATV. In *Buck* and *Statler* the interested parties were copyright holder, broadcasting station, hotel operator, and hotel patrons. The hotel's primary service is to lodge its patrons, not to relay radio music to them. The hotel business goes on, notwithstanding those cases. *Buck* and *Statler* do not adversely affect either hotel or patron, and the merits of those holdings rest solely upon a determination of whether the copyright holder's interests were injured. The holding of the principal case, on the other hand, adversely affects both CATV and its subscribers.

CATV, in bargaining for a license, is at the mercy of copyright holders. CATV's bargaining position differs from that of broadcasting stations. Broadcasters have a wide selection of copyrighted films for programming purposes, and the bargain made between the broadcaster and copyright holder is determined by station demand and availability of suitable feature films. CATV enjoys no such liquidity of supply, however, being limited in its broadcasts to programs offered by those original broadcasters whose channels the CATV system is equipped to receive and retransmit, unless it is able to substitute "fill-in" programs. Under the rule established by the principal case, the copyright holder may exert a death grip upon any CATV operation which intends to retransmit its copyrighted work. While it may be possible for such a CATV operator to obtain a license from the copyright holder, the CATV operator would be strongly disadvantaged because his choice would be either to accept the copyright holder's demand or drop the program. This problem is compounded by the short period of time allowed a CATV operator to reach agreement with the copyright holder, because the time between licensing to the original broadcaster and actual broadcast may be short.

¹² This is premised upon a macroscopic view of the entire television industry. The question remains whether or not operation of economic forces in this overall fashion will necessarily assure a particular copyright holder increased royalties for his license grant. Whether this possibility of individual detriment justifies application of copyright restrictions to CATV generally, is primarily a value judgment.

The countervailing issues of public policy were far less significant in *Buck* and *Statler* than in the principal case because CATV now plays an important role in communications, giving some fringe area viewers their only means of reception. Hotel radio systems fail to serve the valuable public interest in wider geographic availability of communications media promoted by CATV. Furthermore, the principal case may be distinguishable from *Buck* and *Statler*,¹³ because there, the hotels owned and operated the entire radio system, from the master receiver to individual room speakers. CATV, however, neither owns nor operates the television sets upon which the copyrighted films are viewed. For this reason, CATV systems may be regarded in their effect as an adjunct to home television sets,¹⁴ more analogous to rooftop antennas than to the complete, closed systems at issue in *Buck* and *Statler*.

The expected Federal Communications Commission regulation of CATV operations¹⁵ should curb any abuses of interests which deserve protection. For example, CATV systems are capable of deleting advertisements from the original broadcast, and substituting their own revenue-producing commercials. They may also bring original broadcasts of such programs as sporting events into areas "blacked-out" pursuant to agreements between promoters of the event and the original broadcaster. Damage thus done to advertisers, promoters of spectator events, and original broadcasters could be averted by appropriate regulations, as could any possibility of CATV unfair advantage over

¹³ Any distinction between CATV and *Buck* on the ground that the performance in *Buck* was of an unauthorized broadcast of copyrighted matter and CATV retransmits only duly licensed matter is not valid, since in *Statler*, the rebroadcasting was of an authorized original broadcast. For an example of such an invalid distinction, see Comment, *Television Broadcasting and Copyright Law: The Community Antenna Television Controversy*, 41 ST. JOHN'S L. REV. 225, 233-34 (1966).

¹⁴ See *Lilly v. United States*, 238 F.2d 584, 587-88 (4th Cir. 1956):

We think it clear that this community antenna service was a mere adjunct of the television receiving sets with which it was connected

It [the antenna system] merely furnished an attachment to a television receiving set which enables a set disadvantageously located to operate like an ordinary set

The issue in *Lilly* was whether a tax levied upon commercial communications services should also be levied upon CATV. The court reasoned that if the tax were imposed, it would amount to a tax upon television equipment because CATV substituted for a home rooftop antenna. This is a tax case, but the reasoning is nevertheless applicable.

For further argument that generation of electro-magnetic impulses does not constitute a copyright infringing performance, see Keller, *Is Community Antenna Television a Copyright Infringer?*, 43 U. DEB. L.J. 367, 369-71 (1966).

¹⁵ On February 16, 1966, the FCC announced that it would promulgate rules placing CATV systems under FCC jurisdiction. FCC Docket No. 15971, 30 F.R. 6078 (1965).

copyright holders.¹⁰ FCC regulation of CATV, if it is designed to adequately protect copyright holders' interests, is preferable to extension of the *Buck* and *Statler* decisions to an entirely new area where the issues are distinct from these cases.

EXTENSION OF THE SULLIVAN RULE TO NON-OFFICIAL PUBLIC FIGURES

On two separate occasions, Dr. Linus Pauling sued news services for libel. In one case, involving a magazine which had identified Dr. Pauling as a communist without proof of the accusation, his libel action was dismissed by a New York court. In the second case, an editorial in defendant's newspaper falsely reported that Dr. Pauling had been cited for contempt of Congress. He had failed to comply with a congressional demand for a list of associates who had aided him in circulating a petition against nuclear testing, but was never actually cited for contempt. A federal district court's verdict for defendant was affirmed on the merits by the Eighth Circuit Court of Appeals. In both cases, *held*: If a person engages in public debate on controversial and grave issues or attempts to guide public policy, any criticism of such activity, free from actual malice,¹ is privileged. *Pauling v. National Review, Inc.*, 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966); *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), *petition for cert. filed*, 35 U.S.L. WEEK 3082 (U.S. Sept. 6, 1966) (No. 522).

Adopting the minority rule,² the Supreme Court in *New York Times Co. v. Sullivan* applied the first and fourteenth amendments to state

¹⁰ For a discussion of FCC regulations already imposed upon CATV see Zylstra, *Regulation of Community Antenna Television: Assertion of Jurisdiction by the FCC*, 3 LAW NOTES No. 1 (Oct. 1966).

¹ The courts in the principal cases adopted the definition of "actual malice" found in *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964): a statement made "with knowledge that it was false or with a reckless disregard of whether it was false or not."

² *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908), represented the minority rule prior to *Sullivan*. By adopting *Coleman*, the holding in *Sullivan* was not only a change in the substantive law of defamation, but was the initial application of the constitutional protections of freedom of speech and press to state defamation laws. See *New York Times Co. v. Sullivan*, *supra* note 1, at 256; Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 901-03 (1949); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Translation*, 49 CORNELL L.Q. 581, 587 (1964); Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18 VAND. L. REV. 1429, 1435-41 (1965).